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In The

Supreme Court of the United States

October Term, 1990

EMORY C. PARRISH, et al.,

Petitioners,

v.

EMPLOYEES' RETIREMENT SYSTEM OF GEORGIA, et al.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant certiorari to determine if the Supreme Court of Georgia, in holding that Petitioners did not have a valid, enforceable contract right to an irrevocable income tax exemption for their state retirement benefits, properly interpreted the Georgia Constitution.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents in the above-styled action respectfully oppose the Petition for Writ of Certiorari to the Supreme Court of Georgia. This case turns on a narrow question of Georgia law, and none of the considerations justifying review on certiorari are met. Accordingly, Respondents request that the Petition be denied.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is officially reported at 260 Ga. 613 (1990), and reprinted in

the Petitioners' Appendix to Petition for Writ of Certiorari.

STATUTORY PROVISIONS AT ISSUE

(1) U.S. Const., art. I, § 10, cl. 1:

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .

(2) Ga. Const. of 1983, Art. VII, Sec. I, Para. I:

> The state may not suspend or irrevocably give, grant, limit, or restrain the right of taxation and all laws, grants, contracts, and other acts to effect any of these purposes are null and void. Except as otherwise provided in this Constitution, the right of taxation shall always be under the complete control of the state.

(3) 1989 Ga. Laws Ex. Sess. 5 (Respondents' Appendix)

STATEMENT OF THE CASE

On March 28, 1989, this Court ruled in *Davis v. Michigan Dep't of the Treasury*, 489 U.S. 803 (1989), that income tax statutes in Michigan – which provided for the taxation of federal retirement benefits but exempted retirement benefits paid by the State and its political subdivisions – violated 4 U.S.C. § 111 and principles of intergovernmental tax immunity. Because Georgia's income tax statutes totally exempted pension income received from the Employees' Retirement System of Georgia, the Teachers Retirement System of Georgia, and certain other public retirement systems, *see* O.C.G.A.

§ 48-7-27(a)(4) (1982), but did not afford the same treatment to federal retirement benefits, the *Davis* decision raised serious doubts about the continued validity of Georgia's method of taxing such items of income. In September 1989, the Georgia General Assembly, meeting in special session, amended Georgia's income tax statutes to provide identical tax treatment for federal, state, and private pensions, effective for the tax year 1989 and forward. 1989 Ga. Laws Ex. Sess. 5. That legislation has been codified as O.C.G.A. §§ 48-7-27(a)(4),(5) (Supp. 1990).

By complaints filed November 27, 1989, Petitioners (hereinafter "the taxpayers") challenged the new legislation, contending that they had become contractually entitled to an irrevocable income tax exemption for their ERS and TRS retirement allowances, which the State of Georgia could not constitutionally revoke. The trial court granted Respondents' motions for judgment on the pleadings. The taxpayers appealed this ruling to the Supreme Court of Georgia.

On December 3, 1990, the Georgia Supreme Court affirmed the trial court. *Parrish v. Employees' Retirement System of Georgia*, 260 Ga. 613 (1990). Based on the Georgia Constitution, which provides that "[t]he state may not suspend or irrevocably give, grant, limit, or restrain the right of taxation," see Ga. Const. of 1983, Art. VII, Sec. I, Para. I, the Georgia Supreme Court held that the taxpayers did not have a valid, enforceable contract right to an irrevocable income tax exemption, and determined that the Georgia legislature therefore did not unconstitutionally impair the taxpayers' employment contract with the State when it repealed the exemption prospectively.

260 Ga. at 615. The taxpayers now petition for a writ of certiorari to the Supreme Court of Georgia.

SUMMARY OF ARGUMENT

The Contract Clause of the U.S. Constitution does not apply to the withdrawal of a benefit that is not the subject of a valid, enforceable contract. Since 1877, the Georgia Constitution has provided that "[t]he state may not suspend or irrevocably give, grant, limit, or restrain the right of taxation." Based on the clear language of this provision, the Georgia Supreme Court correctly determined that the taxpayers did not have a valid, enforceable contract right to an irrevocable income tax exemption for their state retirement benefits. The Georgia General Assembly did not, therefore, unconstitutionally impair the taxpayers' employment contract with the State when it amended Georgia's income tax statutes to repeal the exemption.

In Contract Clause cases, this Court may determine for itself whether a contract existed and whether its obligations were impaired by subsequent legislation. However, in matters of local policy, like taxes, the Court typically defers to a state court's construction of state law unless it is "manifestly wrong." Because this case involves the Georgia Supreme Court's interpretation of clear language in the Georgia Constitution, reviewable under a deferential test, and because the exceptional circumstances giving rise to this litigation – beginning with this Court's decision in *Davis* – are unlikely ever to be

repeated, no "special and important reasons" for review exist.

ARGUMENT

The taxpayers state the "Question Presented" as follows: "Does a State violate the Contract Clause of the federal constitution (Art. I, § 10) by imposing an income tax on the vested retirement benefits of retired state employees whose benefits were exempt from the tax?" However, the Georgia Supreme Court found, based on the Georgia Constitution, that the taxpayers had no vested right to the income tax exemption which they claimed. The real question is whether the Georgia Supreme Court, in holding that the taxpayers did not have a valid, enforceable contract right to an irrevocable income tax exemption, properly interpreted Georgia law.

Because the taxpayers have not focused on the right issue, the cases they cite are inapposite. The taxpayers claim, for example, that the Georgia Supreme Court's ruling is in conflict with *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). Petition, p. 7. That case involved a 1962 statutory covenant between the States of New York and New Jersey, which limited the ability of the Port Authority of New York and New Jersey to subsidize rail passenger transportation from revenues and reserves. 431 U.S. at 9-10. In 1974, New York and New Jersey repealed the covenant, citing the need to promote mass transportation, energy conservation, and environmental protection. 431 U.S. at 13-14. The trustee for, and holder of, certain Port Authority bonds issued between 1962 and 1973,

brought suit, claiming that the repeal unconstitutionally impaired the obligation of New Jersey's and New York's contract with bondholders.

In addressing the constitutional argument, the Court first noted that the 1962 covenant constituted a valid contract between New York, New Jersey, and the bondholders. 431 U.S. at 17-18. The Court then stated:

> Of course, to say that the financial restrictions of the 1962 covenant were valid when adopted does not finally resolve this case. The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose.

431 U.S. at 25 (footnotes omitted). Because the impairment was, in the Court's view, neither reasonable nor necessary to further the purposes claimed by the States, 431 U.S. at 29, the 1974 statute repealing the covenant was struck down.

The taxpayers argue that the Georgia Supreme Court committed reversible error when it "[failed] to apply, or even to acknowledge, the standards of *United States Trust Co. v. New Jersey*." Petition, p. 9. This contention misses the point, because the protection of the Contract Clause, and the corresponding obligation that the State meet certain standards before it effects an impairment, simply do not come into play unless there is first a valid, enforceable contract, as in *United States Trust Co. v. New Jersey*. "[B]efore we can be asked to determine whether a statute has impaired the obligation of a contract, it must appear

that there was a legal contract subject to impairment . . . ." *New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79, 88 (1891). This is basic to Contract Clause analysis, as recognized by decisions of this Court for well over one hundred years.

In *People v. Commissioner of Taxes*, 94 U.S. 415 (1876), certain taxpayers claimed that their bank shares had been overassessed for property tax purposes.

> [T]he relators insist that, by the act of the legislature of the State of New York, passed March 9, 1865, it was enacted that the shares of a bank could not be assessed at an amount greater than the par value thereof, and that such statute created a contract with the banks organized under the same, which could not be altered by a subsequent legislature. Hence it is argued that the act of 1866, authorizing such shares to be assessed at a rate which may exceed their par value, is a law impairing the obligation of a contract, and is void.
>
> . . .
>
> Had [the 1865 act] been a valid statute, we might have been called upon to discuss the point raised. But it was [earlier] held . . . that this statute was fatally defective. . . . There never was, legally speaking, any such proviso or enactment as the relators claim the benefit of. Of course, there could be no such thing as a violation of a contract contained in a proviso which never existed.

94 U.S. at 418. In *Yazoo and Mississippi Valley Railway Co. v. Adams*, 180 U.S. 1 (1901), the Court stated:

> While we have never hesitated to vindicate the right of individuals or corporations to enforce the performance of lawful contracts [with the

> State] as against subsequent legislation designed to impair them, we have always exacted as a condition that the contract was one which the legislature . . . had power to make under the [State's] Constitution . . . .

180 U.S. at 25. *See also Long Sault Dev. Co. v. Call*, 242 U.S. 272 (1916) (repeal of statute, under which company claimed certain contractual rights from the State, did not unconstitutionally impair obligation of contract, since original statute violated New York constitution and was void); *Zane v. Hamilton County*, 189 U.S. 370 (1903) (where state statute authorizing county bonds violated Illinois constitution, bonds were illegally issued and did not constitute a contract with bondholders which was protected by the U.S. Constitution); *New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79, 88 (1891) ("the city cannot claim that this contract was impaired by subsequent legislation[,] . . . because the contract . . . was *ultra vires* and void"). *See generally General Motors v. Oklahoma County Bd. of Equalization*, 678 P.2d 233, 238 (1983), *cert. denied*, 466 U.S. 909 (1984) ("The Federal Constitution does not protect unenforceable contract rights. The disputed agreement, even if it could be established, is void because no public official or public agency could constitutionally grant the tax exemption allegedly contained in the agreement.")

Since 1877, the Georgia Constitution has provided that "[t]he state may not suspend or irrevocably give, grant, limit, or restrain the right of taxation and all laws, grants, contracts, and other acts to effect any of these purposes are null and void." *See* Ga. Const. of 1877, Art. IV, Sec. I, Para. I; Ga. Const. of 1945, Art. VII, Sec. I, Para. I; Ga. Const. of 1976, Art. VII, Sec. I, Para. I; Ga. Const. of

1983, Art. VII, Sec. I, Para. I. Based on the plain language of this provision, the Georgia Supreme Court determined that the taxpayers did not have an enforceable contract right to an irrevocable income tax exemption. 260 Ga. at 615. That decision is clearly correct, and it disposes of the argument that the Georgia General Assembly unconstitutionally impaired "the obligation of contract" when the legislature repealed the exemption.

Respondents recognize that "[a] claim that a State statute impairs the obligation of contract . . . cannot be foreclosed by a State court's determination whether there was a contract or what were its obligations." *Atlantic Coast Line Railroad v. Phillips*, 332 U.S. 168, 170 (1947). In a case before it, "[this Court is] bound to decide for [itself] whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation." *Indiana v. Brand*, 303 U.S. 95, 100 (1938). Nevertheless, "when . . . dealing with a matter of local policy, like a system of taxation, [the Court] should be slow to depart from [state court construction of a state statute], if there is no real oppression or manifest wrong in the result." *Clyde v. Gilchrist*, 262 U.S. 94, 97 (1923).

Review on writ of certiorari is a matter of judicial discretion and should be granted only when there are special and important reasons for it. U.S. Sup. Ct. Rule 10; *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 73 (1955). Certiorari should not be granted "except in cases involving principles . . . of importance to the public as distinguished from that of the parties." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). This case involves the Georgia Supreme Court's interpretation

of clear language in the Georgia Constitution, in a situation where the Court typically defers to a state court's construction of state law. In addition, the exceptional circumstances giving rise to this litigation – beginning with this Court's decision in *Davis* – are unlikely ever to be repeated. Respondents therefore submit that there are no "special and important reasons" for this Court's review.

CONCLUSION

The taxpayers' petition for writ of certiorari should be denied.

Respectfully submitted,

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INCOME TAXES –
RETIREMENT AND PENSION INCOME.

Code Section 48-7-27 Amended.

No. EX 2 (House Bill No. 1 EX).

AN ACT

To amend Code Section 48-7-27 of the Official Code of Georgia Annotated, relating to the computation of Georgia taxable net income, so as to revoke the exclusion from state income taxation for certain income received from certain public pension or retirement funds or systems; to provide for the exclusion of certain retirement and other income from state income taxation; to provide for conditions of eligibility; to provide for definitions; to provide for certain underpayments or deficiencies with respect to certain estimated income tax returns; to provide for related matters; to provide for an effective date and applicability; to provide for certain liabilities for prior taxable years; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. Code Section 48-7-27 of the Official Code of Georgia Annotated, relating to the computation of Georgia taxable net income, is amended by striking paragraphs (4) and (5) of subsection (a) which read as follows:

> "(4)(A) Income received from the following, and only the following, public pension or retirement funds or systems when the income is otherwise included in the taxpayer's federal adjusted gross income:
>
> (i) Employees' Retirement System of Georgia;
>
> (ii) Georgia Firemen's Pension Fund and all local firemen's pension funds;
>
> (iii) Peace Officers' Annuity and Benefit Fund;

(iv) Trial Judges and Solicitors Retirement Fund;

(v) Superior Court Clerks' Retirement Fund of Georgia;

(vi) Public School Employees Retirement System;

(vii) Georgia Legislative Retirement System;

(viii) Teachers Retirement System of Georgia and all local teachers' retirement systems;

(ix) Teachers' retirement systems or funds of states having a reciprocal agreement with this state to exempt income from the Teachers Retirement System of Georgia from taxation;

(x) Funds, programs, or systems the income from which is exempted by federal law or treaty;

(xi) Superior Court Judges Retirement System; and

(xii) District Attorneys' Retirement System.

(B) It is the intent of the General Assembly that no income from a public pension or retirement fund, program, or system shall be exempt from income taxation in this state unless the exemption is provided for in this paragraph or unless the law granting the exemption makes specific reference to this paragraph;

(5)(A) Retirement income not to exceed $4,000.00 per year received from any source. This paragraph shall not apply to or affect retirement income which is already wholly exempt from income taxation because it is

received from a public pension or retirement fund or system listed in subparagraph (A) of paragraph (4) of this subsection. A taxpayer shall be eligible for the $4,000.00 exclusion granted by this paragraph only if he:

(i) Is 62 years of age or older during any part of the taxable year; or

(ii) Is permanently and totally disabled in that he has a medically demonstrable disability which is permanent and which renders him incapable of performing any gainful occupation within his competence.

(B) The commissioner shall by regulation require proof of the eligibility of the taxpayer for the exclusion allowed by this paragraph;",

and inserting in their places new paragraphs (4) and (5) to describe exclusions from Georgia taxable net income and to read as follows:

"(4) (A) Income received from public pension or retirement funds, programs, or systems the income from which is exempted by federal law or treaty when the income is otherwise included in the taxpayer's federal adjusted gross income.

(B) Except as specifically provided in subparagraph (A) of this paragraph, paragraph (5) of this subsection, and paragraph (7) of this subsection, for taxable years beginning on or after January 1, 1989, no income from a public pension or retirement fund, program, or system (including those pension or retirement funds, programs, or systems provided for in Title 47) shall be exempt from income taxation in this state, notwithstanding any provision of Title 47 or any other provision of law to the contrary;

(5)(A) Retirement income otherwise included in Georgia taxable net income not to exceed the exclusion amount as follows:

(i) For taxable years beginning on or after January 1, 1989, and prior to January 1, 1990, retirement income not to exceed an exclusion amount of $8,000.00 per year received from any source; and

(ii) For taxable years beginning on or after January 1, 1990, retirement income not to exceed an exclusion amount of $10,000.00 per year received from any source.

(B) In the case of a married couple filing jointly, each spouse shall if otherwise qualified be individually entitled to exclude retirement income received by that spouse up to the exclusion amount, so that the total amount excluded on such joint return may if otherwise allowable be up to twice the individual exclusion amount.

(C) The exclusion provided for in this paragraph shall not apply to or affect and shall be in addition to those adjustments to net income provided for under any other paragraph of this subsection.

(D) A taxpayer shall be eligible for the exclusion granted by this paragraph only if the taxpayer:

(i) Is 62 years of age or older during any part of the taxable year; or

(ii) Is permanently and totally disabled in that the taxpayer has a medically demonstrable disability which is permanent and which renders the taxpayer incapable of performing any gainful occupation within the taxpayer's competence.

(E) For the purposes of this paragraph, retirement income shall include but not be limited to interest income, dividend income, net income from rental property, capital gains income, income from royalties, income from pensions and annuities, and no more than $4,000.00 of an individual's earned income. Earned income in excess of $4,000.00, including but not limited to net business income earned by an individual from any trade or business carried on by such individual, wages, salaries, tips, and other employer compensation, shall not be regarded as retirement income. The receipt of earned income shall not diminish any taxpayer's eligibility for the retirement income exclusion allowed by this paragraph except to the extent of the express limitation provided in this subparagraph.

(F) The commissioner shall by regulation require proof of the eligibility of the taxpayer for the exclusion allowed by this paragraph.

(G) The commissioner shall by regulation provide that for taxable years beginning on or after January 1, 1989, and ending before October 1, 1990, penalty and interest may be waived or reduced for any taxpayer whose estimated tax payments and tax withholdings are less than 70 percent of such taxpayer's Georgia income tax liability if the commissioner determines that such underpayment or deficiency is due to an increase in net taxable income attributable directly to amendments to this paragraph or paragraph (4) of this subsection enacted at the 1989 special session of the General Assembly and not due to willful neglect or fraud;"

Section 2. (a) This Act shall become effective upon its approval by the Governor or upon its becoming law

without such approval and shall apply to taxable years beginning on or after January 1, 1989.

(b) Tax, penalty, and interest liability for taxable years beginning prior to January 1, 1989, shall not be affected by the passage of this Act and shall continue to be governed by the provisions of Code Section 48-7-27 of the Official Code of Georgia Annotated as it existed immediately prior to the effective date of this Act.

Section 3. All laws and parts of laws in conflict with this Act are repealed.

Approved September 20, 1989.